

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>RAUL DOMINGUEZ</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 214,520
<b>SEABOARD FARMS, INC.</b>	)	
Respondent	)	
AND	)	
	)	
<b>CRAWFORD &amp; COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

This is a review and modification proceeding. Respondent and its insurance carrier appealed the November 9, 1998, Award entered by Special Administrative Law Judge William F. Morrissey. The Appeals Board heard oral argument in Wichita, Kansas, on May 14, 1999.

**APPEARANCES**

Chris A. Clements of Wichita, Kansas, appeared for the claimant. Kurt W. Ratzlaff of Wichita, Kansas, appeared for the respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board and the parties' stipulations are listed in the Award dated August 26, 1997, entered by Assistant Director David A. Shufelt and the Award on Review & Modification dated November 9, 1998, entered by Judge Morrissey. At oral argument to the Appeals Board, claimant's counsel conceded that \$5.50 per hour would be appropriate to determine claimant's post-injury wage earning ability, if the Board found that claimant has not made a good faith effort to find appropriate employment.

**ISSUES**

This is a review and modification proceeding in a claim for a June 17, 1996 accident. This was initially decided in an August 26, 1997 Award that found claimant had an 8 percent permanent partial general disability based upon the functional impairment rating. Upon review of the initial Award, Special Administrative Law Judge William F. Morrissey

increased the permanent partial general disability rating to 100 percent commencing June 19, 1997.

Respondent and its insurance carrier contend Judge Morrissey erred. They argue that claimant voluntarily quit his job when respondent transferred him for disciplinary reasons to a hog processing plant in Oklahoma. Also, they argue that claimant has not actively looked for work since he quit his job. Finally, they argue that review and modification is not proper because there are no changed circumstances since the initial award was entered. Therefore, they contend the initial award of an 8 percent permanent partial general disability should not be disturbed.

Conversely, claimant contends the award entered by Judge Morrissey should be affirmed.

The issues before the Board on this appeal are:

1. Are there changed circumstances upon which to review the initial August 1997 Award?
2. Do the facts justify modifying the initial Award?
3. If so, what is the nature and extent of disability?

#### **FINDINGS OF FACT**

After reviewing the entire record, the Appeals Board finds:

1. Raul Dominguez worked for Seaboard Farms, Inc., on one of its hog farms in southwest Kansas. On June 17, 1996, Mr. Dominguez injured his back when he was knocked down and trampled by a pig.
2. In an Award dated August 26, 1997, Assistant Director David A. Shufelt found that Mr. Dominguez had a central disc bulge at L4-5 and a herniated disc at L5-S1. The Assistant Director awarded Mr. Dominguez an 8 percent permanent partial general disability based upon the functional impairment rating. The parties did not appeal that Award.
3. After the June 1996 accident, Seaboard accommodated Mr. Dominguez's back injury and provided him light duty work in one of their several hog farms around Hugoton and Rolla, Kansas. The record is not clear whether or not the light duty position was located at the same hog farm where Mr. Dominguez was injured.
4. Mr. Dominguez worked the accommodated job until mid-June 1997 when he was told he was to report to work at Seaboard's hog processing plant in Guymon, Oklahoma.

According to Charlene Ferguson, who was Seaboard's Human Resource Manager at that time, Mr. Dominguez was being transferred because he "seemed" to be making negative comments about the company. Ms. Ferguson testified as follows:

Okay. I received a phone call from the farm manager at the farm that he was located on, Farm 4. He expressed some concerns regarding Raul's being located at that farm for his light-duty assignment. His concerns involved that that is our training farm and that's where our newly-hired employees come in. And there were some issues that Raul was making some -- seemed to be making some statements that were not in a positive sense regarding Seaboard.

5. According to Ms. Ferguson, Mr. Dominguez was not being reassigned because the light duty job was being eliminated but because of the company's concerns about negative comments.

6. The job at Guymon was intended to be a temporary position until a decision was made if Seaboard would accommodate Mr. Dominguez's permanent restrictions. At the time Mr. Dominguez was advised of this reassignment, Seaboard did not know what job Mr. Dominguez would be assigned.

7. Rather than reporting to Guymon, Oklahoma, Mr. Dominguez reported to Seaboard's Hugoton, Kansas, office where he did paperwork for several days. He did not want to transfer to Guymon as he lived in Dodge City and he would then be required to either move his family or drive approximately 127 miles to work, instead of 98 miles, and he would no longer be able to car pool with fellow workers.

8. The record does not disclose a basis for Seaboard's belief that Mr. Dominguez was making negative comments. The farm manager, Erich Glave, who allegedly first complained to Ms. Ferguson, did not testify. Although Ms. Ferguson used an interpreter to speak in Spanish with Mr. Dominguez, we do not know whether Mr. Glave was conversant in Spanish or why he felt Mr. Dominguez "seemed" to be making negative comments.

9. Although there was over a month between the time the farm manager complained to Ms. Ferguson and the time that Seaboard decided to transfer Mr. Dominguez, the record does not disclose that Seaboard ever told Mr. Dominguez that his comments were negative or that he was being transferred to the hog processing plant because of those comments. Instead, the company represented to Mr. Dominguez that it could no longer accommodate him or his restrictions at any of the farms in the Hugoton-Rolla area.

10. When considering the entire record, the Appeals Board agrees with the Judge that Seaboard discontinued providing Mr. Dominguez an accommodated job. Further, the Board finds that, under these circumstances, the transfer to Guymon, Oklahoma, was

merely a pretext. The Board bases that finding on the facts that the record does not establish (1) a basis for the belief that Mr. Dominguez was making negative comments about the company; (2) that Mr. Dominguez was ever confronted about those statements; (3) that Mr. Dominguez was ever told that his negative comments were the reason for his transfer from the hog farm to the processing plant; and (4) that the company actually had a light duty position for Mr. Dominguez to perform at the processing plant.

11. The Board finds that Mr. Dominguez did not act in bad faith in refusing to transfer to Guymon, Oklahoma, which would have required him to either move his entire family or drive approximately 254 miles per day to work a temporary job assignment.

12. Since leaving Seaboard, Mr. Dominguez briefly worked on a clean-up crew at a meat packing plant earning \$5.50 per hour. He quit that job because of back pain. When he last testified in this proceeding in May 1998, Mr. Dominguez was unemployed but not looking for another job.

13. Dr. Pedro A. Murati, formerly the company physician for the Monfort and Excel meat packing plants in western Kansas, examined Mr. Dominguez in December 1997. Based upon his evaluation and diagnosis of a herniated disc at L5-S1 with radiculopathy, he believes Mr. Dominguez has lost the ability to do all six of the work tasks that he performed in the 15 year period before the date of accident. Dr. Murati's testimony is uncontroverted.

14. According to the record, Administrative Law Judge Kenneth S. Johnson set Mr. Dominguez's terminal date for April 5, 1997 and Seaboard's for May 5, 1997. Thus, the record in the original proceeding closed on May 5, 1997.

#### CONCLUSIONS OF LAW

1. An Award may be modified when changed circumstances either increase or decrease the permanent partial general disability. The workers compensation act provides, in part:

Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, **that the award is excessive**

**or inadequate or that the functional impairment or work disability of the employee has increased or diminished**, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, be increasing or diminishing the compensation subject to the limitation provided in the workers compensation act. (Emphasis added.)<sup>1</sup>

2. Respondent and its insurance carrier argue that Mr. Dominguez's circumstances have not changed since the August 1997 Award, therefore, the Award cannot be modified. The Appeals Board disagrees. When Seaboard stopped accommodating Mr. Dominguez in June 1997, the record was closed and both parties' terminal dates had expired. Therefore, the evidence surrounding the termination was not considered in the initial Award. Because the changed circumstances occurred after the record was closed, that evidence may now be considered in the review and modification request.

3. The Board finds that, after the record closed in the original proceeding, Seaboard stopped accommodating Mr. Dominguez's back injury. This constitutes changed circumstances to review the August 1997 Award.

4. Because Mr. Dominguez injured his back, his entitlement to permanent partial general disability benefits is governed by K.S.A. 44-510e, which provides in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

That statute, however, must be read in light of Foulk<sup>2</sup> and Copeland.<sup>3</sup> In Foulk, the Court held that a worker could not avoid the presumption of no work disability contained in K.S.A.

---

<sup>1</sup> K.S.A. 44-528.

<sup>2</sup> Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

<sup>3</sup> Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that paid a comparable wage that the employer had offered. In Copeland, the Court held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wage should be based upon ability rather than actual wages when the worker fails to make a good faith effort to find appropriate employment after recuperating from the injury.

5. Seaboard's attempt to transfer Mr. Dominguez to Guymon, Oklahoma, was not sufficient to invoke the conclusive presumption against work disability contained in K.S.A. 44-510e.<sup>4</sup>

6. Because the Board concludes that Mr. Dominguez was not looking for employment or making a good faith effort to find appropriate employment, a post-injury wage should be imputed for purposes of the wage loss prong of the permanent partial general disability formula. Other than the evidence that Mr. Dominguez found a job paying \$5.50 per hour, the record does not address Mr. Dominguez's post-injury wage-earning ability. Therefore, the conceded \$5.50 per hour, or \$220 per week, should be compared to Mr. Dominguez's average weekly wage on the date of accident. Comparing \$220 to the stipulated \$360.26 average weekly wage yields a 39 percent difference.

7. Uncontradicted evidence which is neither improbable nor unreasonable may not be disregarded unless it is shown to be untrustworthy.<sup>5</sup> Because Dr. Murati's testimony regarding task loss is neither unreasonable nor controverted, the Board finds that Mr. Dominguez has a 100 percent task loss.

8. Averaging the 39 percent difference in pre- and post-injury wages with the 100 percent task loss, the Board finds that Mr. Dominguez has a 70 percent permanent partial general disability commencing June 19, 1997.

### AWARD

**WHEREFORE**, the Appeals Board modifies the November 9, 1998 Award on Review & Modification entered by Judge Morrissey to reduce the permanent partial disability from 100% to 70% for the period commencing June 19, 1997.

For the period from June 17, 1996, through June 18, 1997, Mr. Dominguez is entitled to receive 33.20 weeks of benefits at \$240.19 per week, totaling \$7,974.31, for an 8% permanent partial general disability.

---

<sup>4</sup> See Tharp v. Eaton, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

<sup>5</sup> Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146(1976).

For the period commencing June 19, 1997, Mr. Dominguez is entitled to receive 257.3 weeks of benefits at \$240.19 per week, totaling \$61,800.89, for a 70% permanent partial general disability. Altogether, Mr. Dominguez's total award equals \$69,775.20.

As of June 10, 1999, Mr. Dominguez is owed \$32,747.51 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$37,027.69 is ordered paid at \$240.19 per week.

The remaining orders set forth in the Award on Review & Modification are adopted to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 1999.

---

BOARD MEMBER

---

BOARD MEMBER

---

BOARD MEMBER

c: Chris A. Clements, Wichita, KS  
Kurt W. Ratzlaff, Wichita, KS  
William F. Morrissey, Special Administrative Law Judge  
Philip S. Harness, Director